

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Roberto GONZALEZ Z-306588531

DECISION OF THE VICE COMMANDANT
UNITED STATES COAST GUARD

13

Roberto GONZALEZ

This review has been taken in accordance with 46 U.S.C. 239(g) and 46 CFR 5.35-1.

By order dated 22 February 1979, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, suspended Appellant's seaman's documents for three months on twelve months' probation, upon finding him guilty of misconduct. The specifications found proved allege that while serving as utility man on board SS SHIRLEY LYKES under authority of the document above captioned, on or about 24 November 1978, Appellant, at Montreal, Quebec:

- (1) wrongfully deserted from the vessel, and
- (2) wrongfully failed to join the vessel.

The hearing was held at Houston, Texas, on 14 February 1979.

At the hearing, Appellant elected to act as his own counsel and entered a plea of guilty to the charge and each specification.

Appellant made a statement in mitigation in his own behalf.

At the end of the hearing, the Administrative Law Judge rendered an oral decision in which he concluded that the charge and specification had been proved by plea. The written initial decision was entered on 22 February 1979.

FINDINGS OF FACT

On 24 November 1978, Appellant was serving as utility man on board SS SHIRLEY LYKES and acting under authority of his document while the vessel was at Montreal, Province of Quebec, Canada. Appellant deserted from the vessel on that date.

OPINION

I

Two separate specifications under the charge of misconduct were preferred in this case, both dealing with the circumstances under which the person charged terminated his service aboard SHIRLEY LYKES. It appears that the two might have been preferred to anticipate "contingencies of proof," on the thinking that if the elements of desertion were not all adequately established there could still be support for a finding of a wrongful failure to join.

With offenses of this nature there is no need to anticipate such problems in the pleadings. All the elements of a wrongful failure to join are encompassed in the statement of the desertion and on that statement alone, supposing a failure of proof only as to the specific intent element, the proper findings would be that the wrongful failure to join, implicitly and necessarily alleged in the desertion statement, had been proved. See Decisions on Appeal Nos. 1683 and 1691.

It is not, of course, a reversible error to have preferred the alternative specifications; there was merely a superfluous allegation, just as the characterization of the "desertion" as "wrongful" was superfluous, since the concept of "desertion" by itself precludes a harmless interpretation.

II

The error here which is to be corrected is the finding of both specifications proved and the basing of an order on those findings. Confronted with surplusage of pleadings, an administrative law judge can properly regard one, the lesser, merged and found proved within the scope of the greater, or broader. It is essential, however, that some recognition be accorded to the situation and an action be taken that is not intrinsically contradictory. It would be enough, in a case like this, merely to acknowledge that only one offense, that of desertion, is found proved. On the record here it must be believed that the order entered was adjudged appropriate for the the finding of two distinct offenses.

CONCLUSION

The apparent consideration of two separate offenses as proved may be corrected by a lessening of the order, on determination that the second specification found proved was superfluous.

ORDER

The findings of the Administrative Law Judge made at Houston, Texas, on 22 February 1979, are AFFIRMED but the order then entered is MODIFIED by reducing the period of suspension from three months to two months and the period of probation from twelve months to six

months.

R. H. SCARBOROUGH
VICE ADMIRAL, U. S. COAST GUARD
VICE COMMANDANT

Signed at Washington, D.C., this 28th day of November 1979.

INDEX

Charges and Specifications

included offense pleaded separately

Findings

duplications, included offenses

Pleadings

surplusage, cured by findings

Surplusage

lesser offense separately pleaded